

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

ANTOLIN ANDREW MARKS,

Plaintiff,

v.

JACK BENNETT,

Defendant.

Case No. C07-5674RBL/JKA

ORDER CONVERTING A  
MOTION TO DISMISS TO  
A MOTION FOR SUMMARY  
JUDGMENT

This 42 U.S.C. § 1983/Bivens action has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636 (b) and local Rules MJR 3 and 4. Defendant Bennett has filed a motion to dismiss (Dkt # 17). Plaintiff responded and attached exhibits to his response (Dkt. # 19).

These exhibits were not part of the first amended complaint (Dkt # 12). The exhibits show plaintiff asking for access to all his personal property and all legal materials. Personnel from “GEO” and “ICE” ordered plaintiff to specify exactly what material he needs as his materials had been sorted and inventoried in August of 2007 (Dkt. # 19, exhibits, grievance response dated October 17, 2007).

In this action plaintiff alleges he was denied access to his legal material and as a result he was

1 not able to file a petition for Writ of Certiorari in the Supreme Court. The Writ was to address the  
2 Ninth Circuits denial of a petition to file a second or successive Habeas Corpus petition. The Habeas  
3 Corpus petition challenged a criminal conviction that apparently forms the basis for petitioner's  
4 removal. The term or sentence for the criminal conviction appears to have been served.

5 Plaintiff's filing of exhibits that are not part of the complaint requires the court to either  
6 refuse to consider the exhibits, or to convert the motion to dismiss to a motion for summary  
7 judgment. The exhibits show plaintiff being told to specify what materials he needed to access. The  
8 exhibits directly address the question of whether he was denied access, or ordered to specify what  
9 documents he needed to access. The court will consider the documents. This converts the motion to  
10 dismiss to a motion for summary judgement.

11 If a motion to dismiss is converted to a motion for summary judgment the parties must be  
12 given notice and an opportunity to amend or supplement the filings. Graux v. Pulley, 739 F.2d 437  
13 (9th Cir. 1984). The Court now finds and Orders:

- 14 (1) The motion to dismiss will be considered as a motion for summary  
15 judgment. The defendant should submit any additional briefing or  
16 exhibits they wish by **July 18, 2008**. Plaintiff may file a response by  
**July 25, 2008**. a reply will be due one week after the response has  
been unsealed.
- 17 (2) Neither party has addressed whether plaintiff has a claim for damages  
18 in his complaint, See, (Dkt. # 12 First Amended complaint).
- 19 (3) Both parties need to brief whether plaintiff was denied the ability to  
20 access his legal material or ordered to specify with particularity what  
documents he needed have.
- 21 (4) The clerk is directed to send copies of this order to plaintiff and  
22 counsel for Defendant and calendar the due dates of **July 18, 2008**,  
23 **and July 25, 2008**.

24 DATED this 23 day of June, 2008.

25 /S/ J. Kelley Arnold  
26 J. Kelley Arnold  
27 United States Magistrate